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THE ATTORNEY GENERAL'S GUIDE FOR BOARD MEMBERS OF CHARITABLE ORGANIZATIONS

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THE ATTORNEY GENERAL'S GUIDE FOR BOARD MEMBERS OF CHARITABLE ORGANIZATIONS

SCOTT HARSHBARGER

ATTORNEY GENERAL

COMMONWEALTH OF MASSACHUSETTS



The Commonwealth of Massachusetts
Office of the Attorney General
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SCOTT HARSHBARGER
ATTORNEY GENERAL



Dear Board Member:

The Office of the Attorney General offers this guidance to the members of governing boards of charitable organizations, with an appreciation of your willingness to volunteer for service as a charity board member.

You are performing a public service of the highest order — standing up to the challenge when it would be easier to sit back and let others handle it. On behalf of the public, this office thanks you for your hard work and dedication.

Sincerely,

A handwritten signature in blue ink, appearing to read "Scott Harshbarger", with a horizontal line extending from the end of the signature.

INTRODUCTION

This Guide is provided by the Attorney General's Office to help board members of charitable organizations, and is particularly meant to assist the board members of charitable corporations and associations in the exercise of your important responsibilities.

Often we are asked what we think the most important things are that a board member should do in order to do a good job. Here are our recommendations in key areas of charity stewardship. While this Guide is not intended to prescribe the exact manner in which a Massachusetts charitable board must function, and while we recognize that charities vary greatly in the size, form and structure of their boards, we believe that this Guide will help all board members do their jobs well.

THE BUCK STOPS WITH YOU

If you are a member of the board of a charitable organization, you and your fellow board members are responsible for governing the charity as it carries out its charitable mission. The law imposes upon you two primary duties. The duty of care means that you must act with such care as an ordinarily prudent person would employ in your position. The duty of loyalty means that you must act in good faith and in a manner that you reasonably believe is in the best interest of your charitable organization. As discussed throughout this Guide, it is your job to oversee your chief executive officer and to see that the charity is faithfully carrying out its purpose without extravagance or waste.

This means:

You should attend board meetings and meetings of committees on which you serve. You should make sure that you receive detailed information beforehand about matters which are going to be voted on at a meeting.

You should carefully read all the material which you receive, and prepare yourself to ask questions.

You should use your own judgment, and not simply take the word of your CEO or fellow board members.

In short:

You should be aware of and informed about every major action the charity takes.

KNOW YOUR RIGHTS

In order to carry out your legal responsibilities as a board member, you must be able to make informed judgments about important matters affecting the provision of charitable services to the community served by the charity. The law permits you to reasonably rely on information from the charity's staff, its lawyer, its accountant, outside advisors, and board committees in making those judgments. If you don't have adequate information, you have the right to get it.

This means:

You have the right to have reasonable access to management.

You have the right to have reasonable access to internal information of the organization.

You have the right to have reasonable access to the organization's principal advisors, such as its auditors and consultants on executive compensation.

Senior management must be willing to facilitate board access to books and records of the charity.

Senior management must be willing to facilitate communications between the board and the principal advisors of the charity.

The board has the right, if necessary, to engage the services of outside advisors at the charity's expense to assist it with a particular matter.

In short:

You have the right to obtain the information you need to carry out your responsibilities as a board member.

MAKE SURE YOUR BOARD IS VITAL AND DIVERSE

A charity's board should be vigorous and responsive to the mission of the charity. You should make sure that your board's process of selecting new members assures diversity of viewpoints and rotation of board members and officers. As a board member, you have responsibility for ensuring that the public and charitable role of the charity will be carried out in a way that is the most beneficial to the community and the purpose served by the charity. A nominating process which invites openness, variety, and change is important to achieving this goal.

This means:

Your nominating process should reach out for candidates, and actively recruit individuals whose commitment, skills, life experience, background, perspective or other characteristics will serve the charity and its needs.

A larger candidate pool may result if you include non-board members as well as board members on your nominating committee.

Term limits for board members can be an effective way to ensure board vitality. If your board does not have term limits, board members should be reviewed periodically to confirm that they remain interested in and suitable for the board. Rotation off the board, assignments to off-board committees, and designation as emeritus members are other ways to achieve a vigorous board.

In short:

To avoid becoming labeled as a closed club for "insiders only," choose board members who have an interest in the charity's mission, represent diverse viewpoints, and have a willingness to learn—and then be sure there are opportunities for board renewal.

KNOW YOUR CHIEF EXECUTIVE OFFICER

Hiring the charity's CEO is one of the most important tasks you have. It is the job of the board to engage in a selection process which will allow the board to find the right person to carry out the charity's purpose efficiently and effectively. The charity for which you are responsible can only benefit when the entire board participates in hiring and evaluating its chief executive employee.

This means:

The board should form a search committee at the beginning of the hiring process.

A majority of the search committee members should be board members, but it may be beneficial to include staff members and other able people.

The board should develop a profile of the person most likely to succeed as CEO of the charity it oversees, and look for someone who matches the profile.

If the size of the board permits, the entire board should interview the final candidates and participate in contacting their references.

The entire board should make the final decision to hire the CEO.

After the CEO is hired, the board should periodically review and assess the chief executive's performance, keeping in mind that the board has the authority to discharge as well as hire the CEO.

In short:

Board members should actively participate in selecting and evaluating the charity's CEO.

GET INVOLVED IN SETTING EXECUTIVE COMPENSATION

The board is responsible for setting the compensation of the charity's chief executive employee. When setting CEO compensation, you should be mindful that the public, which supports the charity and uses its services, is interested in knowing the amount. This information is public in Massachusetts and is on file at the Division of Public Charities, Office of the Attorney General, One Ashburton Place, Boston, MA 02108.

This means:

Every board member should know what the CEO is paid. If the CEO is receiving a compensation package, you should know what it includes and its monetary value.

Even if a compensation committee is used, it should not make the final decision.

In setting compensation, the performance of your CEO and salary scales and fringe benefits of other similarly situated executives in the field are factors to consider.

You should remember that CEO compensation is important to the donors of funds, the beneficiaries of the charity, and the community at large.

In short:

Your process for setting CEO compensation, the amount of such compensation, and the terms of such compensation should all be approved by the full board and be sensitive to public concerns.

BEWARE OF CONFLICTS OF INTEREST

You, or a business you control or benefit from financially, may be considering whether or not to engage in a transaction with the charity on whose board you are sitting. A situation of this type presents a potential conflict between your own financial interests and your duty as a board member to be absolutely loyal to the charity. It also may look questionable to the public.

Because of these problems, a board member or related entity should be cautious about entering into a business relationship with the charity the board member is overseeing, and the board should be very cautious about allowing the charity to enter into such a relationship. Such a transaction should not occur unless the board determines it is clearly in the best interest of the charity. Prior to the board vote, the board member should fully disclose his or her financial interest to the entire board, and the board member should not vote on any aspect of the arrangement or be present when it is being discussed or voted upon.

This means:

You should ensure that your board has a policy for dealing with conflicts of interest.

The policy should include a procedure for the annual written disclosure by all board members of their business involvements with the charity and their other board memberships, both for-profit and charitable. The information disclosed should be circulated to all board members and be updated throughout the year as necessary.

Your conflict-of-interest policy should address the issues raised if board members have or might acquire investments that may affect or be affected by the charity's investment decisions.

The policy should also include a procedure for the following: disclosure of financial interest, and withdrawal from discussion and voting by the involved board member. This policy should be followed whenever the charity enters into a business transaction with a board member or with an entity in which a board member has an interest.

It may be advisable to obtain an outside evaluation of any major business transaction which is being proposed between the charity and a board member or an entity in which a board member has an interest. This evaluation is to assure that the proposal is feasible, the terms are favorable to the charity, and the potential pitfalls of such a transaction have been considered.

Because of the sensitivity of conflict-of-interest issues, you may want to require that transactions involving these issues receive a greater-than-majority vote.

The Attorney General recommends that conflict-of-interest policies require that each board member make an annual disclosure to the entire board of the total amount the board member received from the charity during the previous year as a vendor of goods to the charity or on account of services rendered to the charity.

Massachusetts law already requires this disclosure to be made on the annual reporting form filed by the charity.

In short:

Any conflict transaction should be scrutinized very closely by the board, both because of the dynamic it creates within the board and because of the predictable skepticism with which the public will view the transaction, no matter how scrupulously a careful policy is followed.

FOLLOW THE MONEY

As a board member you have primary responsibility for making sure that the charity is financially accountable, has mechanisms in place to keep it fiscally sound, operates in a fiscally sound manner, and is properly using any restricted funds it may have.

This means:

The board should make sure that a realistic annual budget is developed.

The budget should be developed early enough so that the entire board can be involved in its review and approval before the beginning of the fiscal year.

The board should be sure that the charity has adequate internal accounting systems.

Board members should expect management to produce timely and accurate income and expense statements, balance sheets and budget status reports and should expect to receive these in advance of board meetings.

The board should require periodic confirmation from management that all required filings (such as tax returns and the Massachusetts Form PC) are up-to-date and that employee withholding taxes and insurance premiums are being paid when due.

The board should consider the value of maintaining standing audit and finance committees.

The board should make sure that fundraising is done honestly and with integrity. The board also should make sure that any contract with an outside professional fundraiser is fair and reasonable, and that the fundraiser's performance is monitored.

The board should confirm that any restricted gift to the charity is separately accounted for, and that the funds are being used in accordance with the terms of the restriction.

In short:

The board should be involved and informed in all aspects of the finances of the charity.

EDUCATE YOURSELF

A member of the board of a charity should be knowledgeable about his or her role in the governing process, the mission of the charity, and the unique operational and financial issues which face the charity.

This means:

You should have a copy of and be familiar with the articles of organization of your charity and the by-laws of your board.

You should make sure that board education programs are offered regularly.

Particular attention should be given to providing educational opportunities for new board members.

Programs should draw on the expertise of specialists in the fields related to your board responsibilities.

If your board does not have a board manual containing governing documents and other orientation material, it may want to consider developing one.

In short:

As a board member, you must take the initiative to educate yourself on an ongoing basis about your role and responsibilities.

WHERE THIS GETS YOU

If you follow the advice provided here, you will be a productive and effective member of your board. You will have taken the right steps to guard against the possibility of a lawsuit because of disregard or neglect of your duty of loyalty or your duty of care. And you will experience the rewards and personal satisfaction that come with a job well done.

RESOURCES TO ASSIST YOU IN YOUR RESPONSIBILITIES

For a detailed list of books, pamphlets and articles on the responsibilities of charity board members, and a collection of other relevant materials, call the Division of Public Charities in the Office of the Attorney General (671-727-2200 x2101) and ask for the Board Members' Packet.

For training programs, technical assistance, and access to a resource library, call the New England Institute for Non-Profits at Tufts University (617-627-3549).

For help in finding legal and accounting assistance, and management training workshops, call the Support Center of Massachusetts (617-338-1331).

This Guide was developed with the assistance of the Attorney General's Advisory Committee on Public Charities, whose valuable help is gratefully acknowledged. Since this Guide is not a summary of the law and is not intended as a substitute for legal advice, we suggest you consult qualified legal counsel if specific questions arise concerning matters addressed by the Guide.

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